PUBLIC PROSECUTOR

v.

VUN TAIN YIN & ANOR.

HIGH COURT BORNEO, SANDAKAN
ABU MANSOR ALI J
[CRIMINAL APPEAL NO. 2 OF 1985]
19 JUNE 1985

CRIMINAL LAW AND PROCEDURE: *Sentence - Inadequacy of - Principle of degree of deliberation shown by the perpetrators - Consideration of public interest - Penal Code,* s. *292(c).*

The respondents pleaded guilty before the Magistrate for an offence under s. 292(c) of the Penal Code that they did film a pornographic movie containing obscene acts which were later reproduced into video casettes for sale and distribution. The Magistrate sentenced each of them to a fine of RM600, in default one month's imprisonment. The Deputy Public Prosecutor appealed against inadequacy of sentence on the grounds that the Magistrate had failed to take into account the seriousness of the offence and the moral implications of it as well as public interest.

Held:

[1] The sentence imposed was inadequate. The offence was a serious one in that it tended to corrupt or deprave young and innocent minds. There was also the principle of the degree of deliberation to be considered. The respondents' acts were deliberate and motivated by greed for monetary gain.

[2] The interest of the prisoner must be projected against the higher consideration of public interest. It is the duty of the Court to remind the public that when an offence of this nature is committed the punishment can only be imprisonment.

[3] The sentence of fine of RM600 in default one month's imprisonment of the learned Magistrate was wholly inadequate. A sentence of two months' imprisonment was substituted therewith.

[Appeal allowed.]

Legislation referred to:
Penal Code, ss. 292, 292(c)

For the public prosecutor - Abdul Malik bin Hj. Ishak; Peguam Kanan Persekutuan
For the respondents - David Wong; M/s. Peter Lo & Co.

JUDGMENT

Abu Mansor Ali J:

The 1st and 2nd respondents in this appeal pleaded guilty before the learned Magistrate Sandakan on 30 October 1984 for an offence under s. 292(c) of the Penal Code (FMS Cap. 45) that they did film a pornographic movie containing obscene acts which were later reproduced into video cassettes for sale and distribution. The learned Magistrate convicted them on their own plea and each was sentenced to a fine of RM600 in default one month's imprisonment. The learned Deputy Public Prosecutor appealed against inadequacy of sentence.

The grounds were that the learned Magistrate failed to take into account the seriousness of the offence and also failed to take into consideration the moral implications. The learned Magistrate also failed to consider public interest.

From the facts of the case given by the prosecution to which the respondents admitted I am satisfied as to the extent of the involvement of 1st and 2nd respondents. The actors in this pornographic acts or sexual acts were taken to a room in 1st respondent's house and the 2nd respondent operated the camera. The films were reproduced into video cassettes and the Sandakan police recovered 7 video cassettes from four video cassette dealers. The police also managed to seize the camera and the portable home video concerned from Syarikat Wing On Video Centre belonging to one, Tan Chong Kua, from whom the two respondents borrowed.

The Court considered anxiously what is proper sentence in this instance? In the past the ones that had been brought to Court had just been viewers of this type of films and peddlers but in this instance through the vigilance of the police, the film makers themselves. The Court must also remember that the films in this case had not been made for the film makers' private viewing and enjoyment only but the films find themselves in four video cassette dealers. A guess can be made that the film makers must have been paid handsomely as the respondents can afford to lay capital in sending the actors to West Malaysia by plane after the act plus some pocket money provided as well.

It had been said the seriousness of this type of offence is the tendency of this type of pornographic material to corrupt or deprave young and innocent minds if they should reach them and if steps have been taken to make the materials to be within their reach. It is a fact that the materials did reach the dealers. With the present advancement and facilities in video taping and fast copying of these materials the danger that it may be distributed through the system is not only present but real. Indeed at the time the police conducted their search copies were already found in the hands of four video cassette dealers. We do not know how many more are still in the market and will flood and will continue to do so. We have to assume that the respondents knew the consequences of their acts and what was to be done to these pornographic materials.

It has been said many times one of the principles in assessing sentence is the degree of deliberation shown by the perpetrators of the offence. The respondents' acts were deliberate and motivated by greed for monetary gain without second thoughts what they unleash or let loose into the market. It has also been many times said in sentencing the interest of the prisoner is not the only consideration. It must be projected against the higher consideration of public interest and considerations of such matters that they were breadwinners of the family and the like are no mitigating factors.

After having considered all aspects of this offence by the respondents it is felt that it is the duty of this Court to remind the public, so that it may act as an effective deterrent and also speak of the clear stand of the Court when an offence of this nature is committed that the punishment can only be imprisonment.

The Court therefore propose to alter the sentence of fine of RM600 in default one month's imprisonment of the learned Magistrate which the Court considers to be wholly inadequate taking into account the facts and involvement of the respondents. A sentence of a fine is inadequate because it would only have the effect of enabling the respondents to skim off the profits they made to pay for the fine and they then discharge themselves but the act was more serious than that and merit a heavier sentence.

I have considered the cases brought to me by the respondents' Counsel. With respect they did not touch on the adequacy or otherwise of a sentence under s. 292 Penal Code. The facts were different from our present case. I rule they do not apply in this present appeal.

I therefore allow the appeal by the Prosecutor and I ask the respondents to show cause why the sentence already imposed should not be altered to one of a heavier sentence.

I do not find any mitigating circumstances in what was pleaded on their behalf by the Counsel for the respondents.

I therefore set aside the sentence of the learned Magistrate and substitute therewith a sentence of two months' imprisonment.

Except for P2 ("Sharp" home video player) and P3 ("Sharp" camera), the rest of the exhibits are confiscated and to be destroyed by the Court. P2 and P3 are to be inquired by the learned Magistrate on a date to be fixed whether they are to be confiscated or otherwise.

Also found at [1986] 1 CLJ 94